No. 94084-3

SUPREME COURT OF THE STATE OF WASHINGTON

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Appellant.

AMICUS CURIAE BRIEF SUBMITTED BY GEORGIA-PACIFIC LLC

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I. INTRODUCTION

Amicus Curiae Georgia-Pacific LLC ("Georgia-Pacific") respectfully urges the Court to affirm the decision of the Court of Appeals holding that the Department of Natural Resources ("DNR") is an "owner or operator" of aquatic lands under the Model Toxics Control Act ("MTCA"), RCW chapter 70.105D. The Court of Appeals correctly adhered to MTCA's plain language in holding that DNR, as the statutorily identified manager of the State's 2.5 million acres of aquatic lands, is an "owner or operator" under MTCA's broad remedial scheme.

Georgia-Pacific previously filed an *amicus curiae* brief with the Court of Appeals in this matter. Georgia-Pacific hereby supplements that brief to address three points raised by DNR in the Supplemental Brief it filed with this Court.

First, Georgia-Pacific addresses DNR's arguments that it is not an "owner or operator" under MTCA on the grounds that the State, not DNR, holds title to the aquatic lands. As detailed below, DNR's position is directly contrary to the statutory definition of "owner or operator" under MTCA, which broadly extends liability to a person (including a state agency) with *any ownership interest* in the facility *or any control over* the facility. DNR plainly has such interests and control, as is confirmed by its long history of asserting ownership interests over aquatic lands and by this

Court's decision in *Oberg v. DNR*, 114 Wn.2d 278, 787 P.2d 918 (1990), which held that DNR is a "landowner" of similarly situated State-owned forest lands managed by DNR.

Second, Georgia-Pacific addresses DNR's argument that MTCA intended to excuse liability for the State and lessen liability for state agencies. As detailed below, DNR's arguments have no textual basis and should be rejected.

Third, Georgia-Pacific demonstrates that DNR's interpretation conflicts with MTCA's expressly stated purpose. MTCA casts a wide net of liability with the intent of capturing all owners and operators of contaminated sites, whether public or private, because that framework best ensures adequate funding and the expeditious remediation of contamination. DNR's interpretation seriously undermines this purpose by exempting one of the largest landowners (the State), thereby allowing it to escape any role in the remediation of aquatic lands. Such a result is plainly inconsistent with the intent of MTCA and should be rejected.

II. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Georgia-Pacific is a privately held company, headquartered in Atlanta, Georgia. Georgia-Pacific is one of the world's leading makers of tissue, pulp, paper, packaging, building products, and related chemicals.

Georgia-Pacific currently operates a number of industrial facilities throughout the State of Washington.

In addition to its current Washington operations, Georgia-Pacific, as the successor to the James River Corporation, formerly owned a paper mill in the western part of Port Angeles Harbor ("Western Port Angeles Harbor").[1] Operation of that paper mill included the use of state lands leased from DNR. The James River Corporation sold the paper mill to Daishowa America Co., Ltd. (now Nippon Paper Industries USA Co., Ltd. ("Nippon")) in the late 1980s. Agreed Order at 7. Nippon continued to operate that mill, and lease lands from DNR, through early 2017. *Id*. The mill is now owned and operated by the McKinley Paper Co.

The Western Port Angeles Harbor, much like Port Gamble Bay, contains contaminated sediments on aquatic lands managed by DNR. *Id.* at 6-10. Significantly, the contamination in the Western Port Angeles Harbor is attributable, in large part, to wood waste deposited through log rafting conducted pursuant to aquatic leases issued by DNR. *Id*.[2]

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[1] *See* Department of Ecology, Western Port Angeles Harbor, Agreed Order 2013 (No. DE 9781), at 7 (May 28, 2013) ("Agreed Order"), https://fortress.wa.gov/ecy/gsp/Sitepage.aspx?csid=11907.

[2] As was the case in Port Gamble Bay, DNR collected lease payments for the use of these aquatic lands in Western Port Angeles Harbor.

As was the case with Port Gamble Bay, the Washington Department of Ecology ("Ecology") has, under MTCA, identified potentially liable parties that will be responsible for cleaning up contamination in the Western Port Angeles Harbor. *Id.* at 12-13. The potentially liable parties in the Western Port Angeles Harbor cleanup include two public entities, the City of Port Angeles and the Port of Port Angeles, and Georgia-Pacific and three other private entities. *See id.* at 10-12. Ecology also determined that DNR is a potentially liable party.[3] All potentially liable parties, save DNR, are working cooperatively with Ecology pursuant to an Agreed Order to address contamination in the Western Port Angeles Harbor. *Id.* at 4.

Georgia-Pacific files this *amicus curiae* brief because, as the above facts demonstrate, the Court's decision will significantly impact circumstances beyond the present appeal by directly and materially affecting the ongoing remediation efforts in the Western Port Angeles Harbor, as well as every other MTCA cleanup effort in the state involving lands managed by DNR. DNR's arguments, if accepted, would not only exempt DNR from liability under MTCA, but would allow DNR to refuse

[3] *See* Department of Ecology, Document Repository for Western Port Angeles Harbor, DNR Western Harbor PLP Notice (Sept. 18, 2012), https://fortress.wa.gov/ecy/gsp/CleanupSiteDocuments.aspx?csid=11907.

to participate in any remediation effort. This is particularly concerning at sites where DNR is the only remaining viable potentially liable party. As detailed below, DNR's arguments are contrary to the language, purpose, and intent of MTCA, and should be rejected.

III. STATEMENT OF THE CASE

Georgia-Pacific adopts the Statement of the Case set forth in Respondents' Supplemental Brief.

IV. ARGUMENT

A. DNR is the "Owner or Operator" of Aquatic Lands.

MTCA holds a broad category of "persons," including the "owner or operator," strictly liable for the cleanup of a contaminated "facility." RCW 70.105D.040(1)(a). There is no dispute in this case that DNR is a "person" under MTCA, as "person" is broadly defined to include all manner of entities from individuals and corporations, to governmental bodies including a "state government agency, unit of local government, federal government agency, or Indian tribe." RCW 70.105D.020(24). It is also undisputed that the contaminated aquatic lands leased by DNR can be part of a "facility" under MTCA, as that term is broadly defined to include "any site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located." RCW 70.105D.020(8).

DNR is liable under MTCA if it is an "owner or operator" of the facility. MTCA defines "owner or operator" as "[a]ny person with any ownership interest in the facility or who exercises any control over the facility." RCW 70.105D.020(22)(a). By its plain terms, the definition of "owner or operator" is not limited to the entity holding *title* to the property. Rather, "owner or operator" includes persons with "*any* ownership interest" or "*any* control over the facility." *Id*. (emphases added).

As the court below explained, these terms are "broadly" defined. *Pope Res., LP v. DNR*, 197 Wn. App. 409, 418, 389 P.3d 699 (2016). The plain meaning of "ownership" is "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others." *Id*. (brackets in original) (quoting *Black's Law Dictionary* 1138 (8th ed. 2004)).

DNR's "interest" and "control" over state aquatic lands squarely fits within this broad definition of "owner or operator." DNR has the authority to dispose of certain aquatic lands (*see* RCW chapter 79.125), and, in fact, more than 60 percent of the State's tidelands and 30 percent of the State's shorelands have been sold. *See Caminiti v. Boyle*, 107 Wn.2d 662, 672 n.25, 732 P.2d 989 (1987). DNR has the authority to lease aquatic lands, cancel those leases, set the lease rates, and impose

terms and conditions upon those leases. *See* RCW 79.105.210(4) ("The power to lease state-owned aquatic lands is vested in the department, which has the authority to make leases upon terms, conditions, and length of time in conformance with the state Constitution and chapters 79.105 through 79.140 RCW."); RCW 79.105.240 (authority to set lease rates). A percentage of the proceeds (potentially as great as 50 percent) from the sale or lease of those lands is placed in an account specifically dedicated to funding DNR's management activities. RCW 79.64.040. Additionally, DNR has the right to eject trespassers. WAC 332-30-127.

It is well settled that "the fundamental attributes of ownership" include "the right to possess, to exclude others and to dispose of property." *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 329-30, 787 P.2d 907 (1990). DNR possesses these fundamental rights. DNR may dispose of aquatic lands (by sale or lease), may impose conditions on the use of aquatic lands, and has the right to exclude trespassers. *See, e.g.*, RCW 79.105.210; RCW 79.105.240; RCW 79.64.040; WAC 332-30-127. Such attributes are more than sufficient to demonstrate that DNR has "any ownership interest" in aquatic lands or "exercises any control" over such lands and so is liable under MTCA. RCW 70.105D.020(22)(a).

The issue of DNR's "ownership" of state lands was conclusively decided by the Washington Supreme Court in *Oberg v. DNR*, 114 Wn.2d

278, 787 P.2d 918 (1990). In *Oberg*, the Court addressed whether DNR was an "owner of forest land" that it administers under RCW 76.04, a statute that assigns liability to landowners that fail to provide adequate fire protection. 114 Wn.2d at 283. The relevant statute defined "owner" or "landowner" as "the owner or the person in possession of any public or private forest land." RCW 76.04.005(12). The Court squarely concluded that "[b]y definition in the statute, RCW 76.04.005, DNR is a landowner, and has a duty *as a landowner* to provide adequate protection against the spread of fire from its land." *Id.* The Court went further and concluded that DNR also had "common law duties as a landowner" to prevent the spread of fire. *Id*. at 284.

The holding in *Oberg* applies with equal force to aquatic lands managed by DNR. The state holds title to both forest lands and aquatic lands, while DNR is responsible for managing the lands. RCW 79.105.060(20) (explaining that aquatic lands are "owned by the state and administered by the department"); RCW 79.02.010(11) (explaining that forest lands are "lands of the state of Washington administered by the department"). Moreover, the definition of "owner or operator" under MTCA as "any ownership interest" or "any control" over the property is significantly *broader* than the definition of "owner" interpreted in *Oberg* ("the owner or the person in possession"). *See* RCW 76.04.005(12). If, as

in *Oberg*, DNR is the "owner or the person in possession" of the forest lands it manages for the state, *at the very least*, here, DNR must have "*any* ownership interest" in the aquatic lands it manages.

DNR's Supplemental Brief tries to rewrite the decision in *Oberg* (and the underlying statute), claiming that RCW chapter 76.04 specifically "defined DNR as a landowner," whereas the aquatic lands statute does not. DNR Supp. Br. at 10-11. RCW chapter 76.04 *does not* define "DNR" as a landowner. Rather, it states, "'[f]orest landowner,' 'owner of forestland,' 'landowner,' or 'owner' means the owner or the person in possession of any public or private forestland." RCW 76.04.005(12). The Court in *Oberg* concluded that "DNR is within the statutory definition of 'landowner.'" *Oberg*, 114 Wn.2d at 281. DNR was therefore subject, like all forest landowners, to RCW 76.04.730's provisions making it "unlawful for any person to negligently allow fire originating on the person's own property to spread to the property of another." *Id.* DNR "breached" that statutory duty as well as the "common law duty upon a landowner to use due care in preventing the spread of fire." *Id.* at 283.

Simply put, the legislature in RCW chapter 76.04 (and the common law) imposes liability on any "person" who is a forest "landowner" for negligently spreading fire, and DNR is a "landowner" under that statute and the common law. *Id.* at 282-83. Here, MTCA

imposes liability on any "person" that is an "owner or operator" of a contaminated facility and DNR falls under the statute's broad definition of "owner or operator." *Pope Res.*, 197 Wn. App. at 419-21. There is no basis to distinguish this Court's decision in *Oberg*.

Furthermore, DNR's ownership interest in state lands is fully confirmed by DNR's history of acting as the landowner in court cases. DNR defends quiet title actions as the owner of the property. *See, e.g., Draper Mach. Works, Inc. v. DNR*, 117 Wn.2d 306, 310, 815 P.2d 770 (1991) (quiet title action against DNR for section of waterway); *Granite Beach Holdings, LLC v. State ex rel. DNR*, 103 Wn. App. 186, 194, 11 P.3d 847 (2000) (quiet title action for prescriptive easement over state forest lands). DNR also defends against condemnation actions as the owner of the property. *See, e.g., Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 528, 342 P.3d 308 (2015) (DNR petition challenging utility's authority to condemn state trust lands). Indeed, DNR's administrator, the Commissioner of Public Lands, has gone so far in defending against a condemnation action as to sue the State Attorney General when the Attorney General refused to appeal an adverse condemnation decision. *Goldmark v. McKenna*, 172 Wn.2d 568, 570, 259 P.3d 1095 (2011). Thus, DNR has not only been found to be the "owner"

of public lands by the Washington Supreme Court in *Oberg*, but it also asserts itself in court as the owner of those properties.

Equally important, Washington courts have found that a person was the "owner" of property (a standard much higher than "any ownership interest") under circumstances where the person asserted far fewer indicia of ownership than DNR asserts over aquatic lands. For example, this Court in *Washington State Department of Labor & Industries v. Mitchell Brothers Truck Line, Inc.*, 113 Wn. App. 700, 54 P.3d 711 (2002), determined that a company that leased trucks was the "owner" of those trucks even though the company did not hold title to those trucks, could not "sell or . . . dispose of the" trucks, and "[could] not even borrow against a truck's value." *Id*. at 707-08. Indeed, Washington courts do not find that title holding alone is a necessary or sufficient basis for establishing ownership. *See Wasser & Winters Co. v. Jefferson Cty.*, 84 Wn.2d 597, 600, 528 P.2d 471 (1974) (contract to purchase uncut timber provided sufficient "indicia of ownership" in that timber to warrant taxation; "issue is not whether [a person has] absolute control over all aspects of the timber but whether there is an interest sufficiently distinct from the fee interest of the State of Washington to come within the statutory definition of the terms 'held' or 'owned'"); *Sowa v. Nat'l Indem. Co.*, 102 Wn.2d 571, 576, 688 P.2d 865 (1984) (seller, who "had

surrendered all indicia of ownership except the legal title," held not to have ownership interest).

Simply put, the plain language of MTCA imposes liability on a "state government agency" with "any ownership interest" or that "exercises any control" over a contaminated facility. DNR leases aquatic lands (and DNR signs those leases), sets the terms and conditions of those leases, and uses the proceeds from the leases to fund its operations. This is more than enough to demonstrate that DNR has "any ownership interest" *and* "any control" over state aquatic lands, and therefore to establish liability under MTCA.

B. MTCA Was Not Intended to Exclude DNR from Liability.

DNR tries to escape liability by arguing (a) that it is "undisputed" that the state itself cannot be held liable under MTCA; (b) that the state (not DNR) "is the 'person' with the ownership interest," and (c) accordingly, that the Court should infer that "MTCA focuses on the involvement of a state agency in the polluting activity," rather than its ownership interest. DNR Supp. Br. at 6-8. These arguments have no merit.

Whether or not the state itself can be held liable is outside the scope of this appeal. DNR is the respondent here, not the State of Washington. There is no dispute that DNR is a "person" under MTCA

that may be subject to the full scope of MTCA liability if it is an "owner or operator" of a contaminated facility. Whether the state is independently liable is not at issue in this appeal.

Moreover, the issue of the state's liability is far from "uncontested." Georgia-Pacific contested the issue below in response to arguments made by DNR. *See* Georgia-Pacific Amicus Br. at 12-14. So did the *amicus curiae* that drafted the original statute for voter approval, explaining that there was no intent to exclude the state itself from liability. *See* Amicus Br. of Jolene Unsoeld, Janice Niemi, and David Bricklin at 7-8. DNR then urged the court below to "decline to consider" the issue of the State's liability. *See* DNR's Answer to Amicus Brs. of Georgia-Pacific and Sierra Pacific at 8. The court below did not decide the issue. The issue is undecided, not "uncontested."

In any event, DNR's attempt to infer a lesser liability standard for state agencies has no basis in the text of the statute. MTCA imposes liability on state agencies, and—just as with any other "person" under the statute—attaches liability to any person with "any ownership interest" in or "any control" over a facility. There is no lesser liability standard for state agencies expressly or impliedly found in the statute. Indeed, the drafters of the statute intended the opposite. They included "state agencies" to "assure[] coverage of these State owned lands by focusing on

the state agencies that manage the land." *See* Amicus Br. of Jolene Unsoeld, Janice Niemi, and David Bricklin at 7-8.

Moreover, DNR's interpretation ignores settled canons of interpretation governing state claims of immunity. As a general rule, the State of Washington has provided broad waivers of sovereign immunity for all manner of tortious acts. *See* RCW 4.92.090 (the "state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation"). As the Court explained in *Oberg*, in light of this "all-encompassing waiver of sovereign immunity" the court views other statutory schemes "with the premise that DNR, whether acting in its governmental or proprietary capacity, is liable for its tortious conduct," and that there are only "rare instances" where no liability attaches. *Oberg*, 114 Wn.2d at 281-82. There is nothing in MTCA that suggests the drafters intended to depart from the general principle that the state (and its agencies) are liable just as any other private person or corporation.

C. DNR's Interpretation is Inconsistent with the Primary Purpose of MTCA to Broadly Assign Liability for the Remediation of Contaminated Sites.

DNR claims that Appellants' interpretation would unfairly expand taxpayer liability because DNR manages 2.6 million acres of aquatic

lands. DNR Supp. Br. at 19. DNR further argues that other parties (like Appellants) are more responsible for the contamination, and that DNR did all it could do to prevent pollution, including putting conditions in its leases that "prohibited the release of hazardous, toxic, or harmful substances." *Id.* at 16. These arguments fundamentally misunderstand how MTCA operates.

MTCA, chapter 70.105D RCW, was enacted in 1988 to protect each citizen's fundamental and inalienable right to a healthful environment. RCW 70.105D.010(1). To further that goal, MTCA imposes strict liability, jointly and severally, on all statutorily responsible parties that are "caught in its sweep." *City of Seattle v. Wash. State Dep't of Transp.*, 98 Wn. App. 165, 170, 989 P.2d 1164 (1999); *see* RCW 70.105D.010(5). This aggressive liability scheme is necessary "[b]ecause it is often difficult or impossible to allocate responsibility among persons liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously." RCW 70.105D.010(5).

DNR's concerns about who is the *most responsible* party, or whether it is *fair* to impose costs on a particular owner or operator, are relevant only *after* determining the full universe of liable parties. Under the statute's private right of actions provision, MTCA authorizes trial courts to allocate financial responsibility between responsible parties

based on "'equitable factors it deem[s] appropriate.'" *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 607, 937 P.2d 1148 (1997) (brackets in original; citation omitted). At this stage in the remediation process, courts commonly consider "the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste," "the degree of care exercised by the parties with respect to the hazardous waste," and any "additional factors" the court deems relevant. *PacifiCorp Envtl. Remediation Co. v. Wash. State Dep't of Transp.*, 162 Wn. App. 627, 654, 665, 259 P.3d 1115 (2011) (citation omitted). If DNR wants to argue that the extent of its financial responsibility should be limited because of its special role as the manager of state lands, the place to make that argument is at the allocation stage, not the liability stage.

Equally important, DNR's interpretation would punch a large hole in MTCA's comprehensive liability scheme. One of MTCA's primary mechanisms for ensuring the expeditious remediation of contaminated properties is to impose liability on current and former owners and operators. DNR manages approximately 2.6 million acres of aquatic lands

and 3.2 million acres of uplands.[4] Under DNR's view of MTCA, the State of Washington itself would never be liable under MTCA because (in DNR's view) the State is the sole "owner or operator," but is not a "person" and so can never be liable under MTCA. *See* RCW 70.105D.040. Similarly, DNR would never be liable under MTCA because (in DNR's view) its comprehensive ability to sell or lease such lands, or make management decisions regarding the use of those lands, does not constitute "any ownership interest" or "control" of those properties.

The consequence of DNR's interpretation is that more than five and a half million acres of land in the state will be left without an "owner" that is liable under MTCA. This result would apply to both past contamination on state lands (including contamination where other potentially liable parties are no longer solvent) and any contamination on state lands that might occur in the future. DNR's interpretation would leave no current owner responsible for ensuring remediation of these state lands, thereby frustrating the intent of MTCA to force prompt remediation.

[4] State of Washington Recreation and Conservation Office, Washington Public Lands Inventory, http://publiclandsinventory.wa.gov/#Map (last visited July 26, 2017).

Furthermore, the statute offers no support for DNR's claims that the drafters of MTCA wanted to "limit the taxpayers' liability." DNR Supp. Br. at 8. In fact, a simple reading of MTCA makes clear the intent to hold every conceivable form of public entity liable. In addition to state agencies, MTCA makes a "unit of local government" as well as a "federal government agency" liable as owners and/or operators. RCW 70.105D.020(24). Ports, cities, and counties are often named as potentially liable parties, even when they simply own property in their proprietary capacity. *See, e.g., supra* page 4 (Port of Port Angeles named as potentially responsible party). If the intent of MTCA was to limit taxpayer liability, it assuredly would have exempted these entities as well.

To the contrary, MTCA expressly recognizes that "[t]he costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers." RCW 70.105D.010(2). Accordingly, MTCA also states that "each responsible person should be liable jointly and severally" to ensure that sites are cleaned up "expeditiously." RCW 70.105D.010(5). Except in narrowly defined circumstances, every owner or operator, former owner or operator, arranger, or transporter is on the hook for remedial action, and every such entity is therefore incentivized to cooperate fully in the remediation process. *See* RCW 70.105D.040(1).

DNR's interpretation of MTCA runs afoul of this purpose as well. DNR controls activity on aquatic lands, and has the authority to limit, control, or outright deny remediation actions on aquatic lands. Yet, under its interpretation, unlike every other current property owner in the state, DNR would have no obligation at all to cooperate in the remediation, and no incentive (in the form of joint and several liability) to ensure that the remediation occurs in an expeditious manner. This is flatly inconsistent with MTCA's central purpose.

Lastly, DNR's current claims of immunity from MTCA liability are inconsistent with its own past practice. In 2002, the Port of Seattle and Pacific Sound Resources sued DNR for response costs under MTCA based on DNR's ownership of "2.3 acres of filled . . . aquatic lands" that DNR had leased to Pacific Sound Resources. *See* 69 Fed. Reg. 63,149, 63,149 (Oct. 29, 2004) (federal register notice describing state court actions under MTCA). DNR agreed to pay its share of the response costs, and the Washington State legislature appropriated the funds to pay that settlement. *Id*.; *see also* 2003-2005 Omnibus Appropriations Act – Agency Detail, at

68, 133 (describing lawsuit and appropriation of $4.75 million to settle DNR's liability).[5]

In short, DNR's narrow reading of MTCA to exclude itself from liability cannot be reconciled with the language or purpose of the statute. MTCA casts a wide net of liability to capture *all* owners and operators — whether individuals, corporations, or public entities — to ensure the funding necessary for prompt and efficient remediation of contaminated sites. DNR's self-created and novel exception is antithetical to that purpose and therefore must fail.

V. CONCLUSION

For the foregoing reasons, this Court should rule that DNR is the "owner or operator" of state owned aquatic lands.

DATED this 11th day of August, 2017.

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[5] http://leap.leg.wa.gov/leap/budget/lbns/2004partv.pdf (last visited July 26, 2017).

CERTIFICATE OF SERVICE

I, Sherry R. Toves, hereby certify:

I am over the age of 18 years. On August 11, 2017, I served a true and correct copy of the foregoing **AMICUS CURIAE BRIEF SUBMITTED BY GEORGIA-PACIFIC LLC** via email on the following persons:

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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

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